

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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CHAD EVANS and DAVID HERNANDEZ,
on behalf of themselves and others similarly
situated,

Plaintiffs,

v.

INSULATION MAINTENANCE AND
CONTRACTING; PAYROLL SOLUTIONS I,
INC.; and TRACY BULLOCK,

Defendants.

2:10-CV-01425-LRH-PAL

ORDER

Before the court is Plaintiffs' consolidated motion for entry of clerk's default (#64¹) and for default judgment (#61) against Defendants Tracy Bullock and Insulation Maintenance and Contracting.

This is an action under the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-219, for the alleged failure to pay overtime wages. The Complaint (#1) was filed on August 23, 2010. On September 30, 2010, Bullock and Insulation Maintenance filed an Answer (#16). Shortly after this court denied Defendant Payroll Solutions I, Inc.'s motion to dismiss, on May 3, 2011, counsel for Bullock and Insulation Maintenance moved to withdraw (#43). On May 5, 2011,

¹Refers to court's docket entry number.

1 the magistrate judge entered an order (#44) granting the motion to withdraw and setting a deadline
2 of May 23, 2011, in which Bullock (an individual) shall either retain new counsel who shall file a
3 notice of appearance or file a statement the he will be proceeding *pro se*, and in which Insulation
4 Maintenance (a corporation) shall retain new counsel who shall file a notice of appearance. The
5 order further warned that “[f]ailure to comply . . . may result in sanctions.” Neither defendant
6 complied with the court’s order; however, the court has yet to take further action.

7 On November 23, 2011, Plaintiffs filed the instant application for entry of default and
8 default judgment. Plaintiffs argue simply that Bullock and Insulation Maintenance “to date, have
9 not filed to retain new counsel and have otherwise ceased to defend Plaintiffs’ action against
10 them.”

11 Federal Rule of Civil Procedure 55(a) authorizes the clerk to enter a party’s default only
12 when that party “has failed to plead or otherwise defend.” Thus, no default may be entered if the
13 party has filed a response indicating its intent to defend the action. *See* Fed. R. Civ. P. 55(a), 2007
14 advisory committee’s note; Schwarzer, Tashima & Wagstaffe, Cal. Prac. Guide: Fed. Civ. Pro.
15 Before Trial ¶ 6:28 (The Rutter Group 2009). Here, entry of default is inappropriate under Rule
16 55(a), as Bullock and Insulation Maintenance indicated their intent to defend this action by filing an
17 answer to Plaintiffs’ complaint.

18 Bullock and Insulation Maintenance may well be subject to sanctions for failure to comply
19 with this court’s orders and rules, potentially including entry of default and default judgment.
20 Indeed, this court entered default judgment against Defendant Payroll Solutions I, Inc. after it failed
21 to respond to the magistrate judge’s order to retain counsel and a subsequent order to show cause
22 that specifically warned that failure to respond would result in a recommendation to the district
23 judge to strike its answer and enter default. The court also notes that default judgment is a potential
24 sanction for a party’s failure to comply with discovery obligations. *See* Fed. R. Civ. P. 37(b).

1 At this time, however, Bullock and Insulation Maintenance been not been given any
2 warning like that issued to Payroll Solutions. Notice that default may be entered for failure to
3 respond to the court's order to retain counsel is appropriate before such a severe sanction is
4 imposed. Also, Plaintiffs have filed no motion for sanctions under Rule 37, and their present
5 motion contains no specific facts (e.g., last activity, attempted communications, etc.) to support the
6 conclusory allegation that the defendants have "otherwise ceased to defend Plaintiff's action
7 against them."

8 Such concerns apply with special force as to Bullock. Whereas Insulation Maintenance
9 must retain substitute counsel because a corporation cannot appear except through counsel, the
10 same cannot be said of Bullock, who has the right to proceed *pro se* as an individual. Thus, while
11 Bullock's failure either to retain substitute counsel or to file a statement that he will be proceeding
12 *pro se* constitutes a technical violation of the magistrate judge's order of May 5, 2011 (#44), mere
13 silence does not necessarily constitute failure to appear or a forfeiture of Bullock's right to appear
14 and defend himself. The court shall therefore deem Bullock as proceeding *pro se*.

15 IT IS THEREFORE ORDERED that Plaintiffs' Application for Entry of Default and
16 Default Judgment (#64 and #61) is DENIED without prejudice.

17 IT IS FURTHER ORDERED that Defendant Insulation Maintenance and Contracting shall
18 show cause, in writing, no later than January 31, 2012, why sanctions should not be imposed for
19 failure to comply with this court's Order (#44). Failure to timely comply with this order may result
20 in this Defendant's answer being stricken and entry of default.

21 IT IS SO ORDERED.

22 DATED this 10th day of January, 2012.



23
24
25 LARRY R. HICKS
UNITED STATES DISTRICT JUDGE